United Brotherhood of Carpenters and Joiners of America, Local No. 745, AFL–CIO *and* SC Pacific Corporation and S & M Sakamoto, Inc., Intervenor. Case 37–CE–18

September 30, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On June 3, 1992, Administrative Law Judge William L. Schmidt issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief. The Charging Party and the Intervenor filed briefs in opposition to the Respondent's exceptions and in support of the judge's decision.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

As more fully described by the judge, S & M Sakamoto (S & M) is one of Hawaii's larger building contractors in new commercial, industrial, and government construction. In 1986, SC Pacific (SC) commenced operations as a building contractor for residential construction and renovation. Although the two companies are essentially owned by the same family, the judge found that S & M and SC are not operationally integrated, financially dependent on each other, or commonly managed. He also found that they serve basically different customer markets and have separate labor relations policies, employees, supervisors, office locations, bank accounts, insurance policies, and business licenses. The judge further found that the equipment purchases, rentals, and repairs between the two companies have been arm's-length transactions. Under these circumstances, the judge found no alter-ego relationship between the two companies. Indeed, he found the companies to be separate employers. We agree.[1]

On September 29, 1989, 4 years after SC's incorporation, the Respondent filed a grievance contending that S & M had contravened section 22 C 1(a) of the Master Agreement[2] by using nonunion SC as a ''double-breasted operation'' on the theory that this contract provision prohibits double-breasting altogether. According to the testimony of Ronald Takeda, the Respondent's community service and education director, and Walter Kupau, its financial secretary and business representative, the Respondent viewed section 22 C 1(a) as designed to reach double-breasting regardless of whether a single-employer/alter-ego relationship exists. Thus, both witnesses indicated that the Respondent viewed double-breasting and alter-ego status as coextensive and interchangeable.

The grievance was referred to the State Joint Board (SJB) for an expedited hearing. On October 12, 1989, the SJB upheld the grievance and granted the relief requested by the Respondent. Thereafter, the Respondent sought to confirm the subsequent favorable SJB award in Federal district court. As explained by the administrative law judge, when the court requested clarification of this award, the SJB unanimously decided that S & M had violated section 22 C 1(a) by using SC as ''a double-breasted operation.'' The SJB specifically stated that S & M had to ''immediately cease the double-breasting operation.''

For the reasons given by the judge, we agree with his conclusion that the Respondent violated Section 8(e) of the Act by filing the September 29 grievance, prosecuting it before the SJB, and thereafter seeking to confirm the subsequent favorable SJB award in Federal district court. The judge initially found that the Respondent's grievance and subsequent effort to enforce the favorable SJB award satisfied the ''enter into'' and ''cease doing business'' requirements of Section 8(e). He also observed that the Respondent did not claim that the onsite proviso of Section 8(e) applied here. Then, based on his findings summarized above, he found that SC and S & M are separate employers and therefore the Respondent's work-preservation claim lacked merit. He thus concluded that the September 29 grievance was actually a ''work acquisition device.''

In declining to find a violation here, our dissenting colleague suggests that this was just a case of innocent confusion regarding terminology by a union that was simply pursuing a ''colorable work preservation claim'' against a stonewalling employer. He argues that because the language of the contract clause in question was not unlawful on its face, the Respondent should not be faulted for pursuing a grievance under it simply because, as it turned out, the targeted entity was not a true alter ego of the signatory employer.

In fact, we are not finding a violation merely on the ground that the Respondent's understanding of the facts turned out to be wrong. Our decision turns on our finding that the Respondent's theory of what would constitute a contract violation amounted to enforcing the clause as if it were the equivalent of a clause that would be unlawful on its face. Nor was this just a matter of innocently confused terminology, as our dissenting colleague suggests. Business Representative Kupau did not merely make the mistake of confusing the concepts of alter ego and single employer with the phe-

[1] Our dissenting colleague also agrees with this finding of the judge.

[2] Sec. 22 C 1(a) of the Master Agreement prevents a signatory contractor from ''illegally using an alter-ego operation to escape the obligations of this collective bargaining Agreement.''

nomenon of double-breasted employers.[3] He made it quite clear in his testimony that the clause was intended to prohibit a signatory employer even from simply *owning* another company that does business in the same industry unless that other company is brought under the master agreement.[4] This is the same vice that the Board found in the ''Integrity Clause'' at issue in *Sheet Metal Workers Local 91 (Schebler Co.)*, 294 NLRB 766, 770–771 (1989), enfd. 905 F.2d 417 (D.C. Cir. 1990): treating common ownership alone, without regard to whether there is evidence of common management or common control of labor relations, as a trigger for forcing a signatory employer to the choice of either extending the contract to the affiliated entity or eliminating its ownership of that entity.[5]

Finally, we are not persuaded by our colleague's view that the Respondent was entitled to pursue its grievance and seek confirmation of the SJB award because it had received insufficient answers to its questionnaire directed to S & M and there had been no ''prior Board determination'' that the contract clause, as the Respondent construed it, violated Section 8(e). If the Respondent had reasonable grounds for suspecting that SC was an alter ego of S & M and the latter refused to give complete answers to questions relevant to such an inquiry, this agency was available to provide appropriate relief. See, e.g., *Consolidation Coal Co.*, 307 NLRB 69 (1992), and cases there cited (requiring the employer to provide information relevant to alter-ego theory). Certainly it was not necessary to pursue a grievance on an unlawful theory to obtain the information. As for the suggestion that the Respondent may, with impunity, enforce a clause in a manner that violates Section 8(e) so long as the Board has not yet spoken on the legality of such conduct, we note that this is contrary to the customary application of legal prohibitions. Just as an ''employer acts at its peril when it takes steps calculated to chill the exercise of Sec. 7 rights by individuals who may later be found to be under the protection of the Act,''[6] so a union acts at its peril in enforcing a contractual restraint that may later be deemed unlawful under Section 8(e). Congress did not provide that it was lawful to enter into agreements of the sort proscribed in Section 8(e) so long as the Board had not held in some earlier case that they were unlawful.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, United Brotherhood of Carpenters and Joiners of America, Local No. 745, AFL–CIO, Honolulu, Hawaii, its officers, agents, and representatives, shall take the action set forth in the Order.

MEMBER DEVANEY, dissenting.

I agree with the judge that the Charging Party and the Intervenor are not alter egos, despite their close ties. However, I decline to join my colleagues in adopting the judge's finding that the Respondent violated Section 8(e) of the Act. In my view, the result reached by the judge encourages an artificial application of Section 8(e) and is not consistent with the policy goals of the NLRA. In precluding the Respondent from taking reasonable measures to pursue its colorable work-preservation claim[1] against the Charging Party, the Board discourages resort to the expedited arbitral process agreed on by the parties.

A brief overview of the facts follows. In 1940, Katsuki Sakamoto and his brother, Minoru, formed K & M Sakamoto (K & M), a partnership, to operate as a building and construction contractor in Hawaii. K & M constructed industrial, commercial, and govern-

[3] It is clear in judicially approved Board law that the term ''double breast'' is broader than the terms ''alter ego'' or ''single employer.'' A company may set up a related company in such a way that it is neither an alter ego nor a single employer with the first company. See *Carpenters District Council of Northeast Ohio (Alessio Construction)*, 310 NLRB 1023 (1993), and cases there cited.

[4] In particular, Kupau testified: ''It was a general understanding of the industry, not only my understanding, that any signatory employer who had ownership or joint ownership in any other company doing business in the industry was considered a double-breasting company and that would be illegal under their Union contract.'' Although the award of the Joint Board was not similarly explicit when it stated that the clause was ''intended to prohibit double breasting,'' the fact that its award rested on stipulated facts that would not support a finding of alter ego or single employer under applicable law makes clear the unlawful manner in which the Joint Board construed the clause. Certainly our dissenting colleague cannot reasonably maintain that the Joint Board was simply ''confused'' about the meaning of the terms. It is the decision of the Joint Board which the Respondent is seeking to have enforced in court.

[5] We acknowledge, as our dissenting colleague points out, that *Schebler* concerned a clause unlawful on its face. But other Board precedents establish that a union or employer cannot evade the strictures of Sec. 8(e) by the subterfuge of agreeing to a provision lawful on its face and then construing and enforcing that provision so as to accomplish objectives forbidden by Sec. 8(e). *Elevator Constructors (Long Elevator)*, 289 NLRB 1095 at fn. 2 (1988), enfd. 902 F.2d 297 (8th Cir. 1990); *Retail Clerks Union Local 779 (Hughes Markets)*, 218 NLRB 680, 683 fn. 11 (1975). Indeed, in *Longshoremen ILWU Local 13 (Egg City)*, 295 NLRB 704, 705 (1989), on which our dissenting colleague relies, the Board expressly noted that ''there are circumstances under which the Board will find a violation of Section 8(e) by virtue of an arbitrator's award issued within the 10(b) period, even if the collective-bargaining agreement was not unlawful on its face.'' No 8(e) violation was found in *Egg City* because the Board concluded that the clause at issue there was not even ''amenable'' to an unlawful construction. Id. That is not the case here, where the contract does not define the phrase ''alter ego.''

[6] *Shelby Memorial Home*, 305 NLRB 910 fn. 2 (1991), enfd. 1 F.3d 550 (7th Cir. 1993), citing *Sav-On Drugs*, 253 NLRB 816, 820–821 (1980), enfd. 726 F.2d 1254 (9th Cir. 1984) (en banc).

[1] Even though the judge ultimately found that the Respondent's work-preservation claim lacked merit, he explicitly recognized that the position taken by the Respondent had ''considerable appeal'' and was not clearly untenable.

mental facilities and private residences. In the early 1960s, K & M ceased building private residences and focused entirely on its business and Government market. In 1965, K & M was succeeded by S & M Sakamoto (S & M), a closely held family corporation formed by Minoru Sakamoto and another brother, Shuichi. Their four sons became S & M's corporate officers. S & M continued K & M's operations, including its bargaining relationship with the Respondent, and later became bound to the Master Agreement covering carpenters in Hawaii effective August 2, 1984. In 1984 or 1985, Norman Sakamoto, the son of Shuichi and a vice president and director of S & M, expressed a desire to form his own company to specialize in residential construction and renovation. In September 1985, SC Pacific Corporation (SC) was incorporated for this purpose. Shortly thereafter, Norman resigned from his positions at S & M and took over as SC's president and secretary-treasurer. In January 1986, SC commenced operations on a nonunion basis.

In the summer of 1989, the Respondent had misgivings about S & M's connection to SC and the latter's nonunion status. Previously, as a result of the 1984 contract negotiations, the parties had added section 22 C 1(a) of the Master Agreement[2] and the Respondent suspected that S & M may have run afoul of that provision based on its involvement with SC. In July 1989, the Respondent sent Gerard Sakamoto, Norman's brother and the president of S & M, an 11-page document listing 79 separate questions. This questionnaire sought detailed information to ascertain the exact extent of S & M's relationship to SC. Gerard completed the questionnaire, but did not consult with his brother Norman or any other SC representative. As a consequence, many questions pertaining to SC were left unanswered, and vital data about S & M's connection to SC sought by the Respondent was not provided. I am persuaded that this lack of cooperation by S & M influenced the Respondent to take the more formal approach, described below, to ferret out the facts relating to its plausible suspicions about SC's separateness from S & M.

In this context, the Respondent filed its September 29, 1989 grievance against S & M. The Respondent identified section 22 C 1(a) as the contract provision involved and described SC as a ''double-breasted operation'' of S & M. The State Joint Board (SJB) upheld the grievance and granted the relief sought by the Respondent. In an attempt to stay the SJB hearing, S & M commenced an action in Federal district court. Then, on March 27, 1990, the Respondent filed a motion with the district court seeking confirmation of the SJB award. At the court's request, the SJB award was clarified on May 29, 1990, as summarized in the judge's decision.[3]

In finding that the Respondent's grievance and its subsequent motion filed with the court converted section 22 C 1(a) into a de facto hot cargo agreement prohibited by Section 8(e), my colleagues rely on the Respondent's misunderstanding of the precise meaning of the terms ''double-breasting'' and ''alter ego.'' Unquestionably, the two union representatives who testified were confused about the exact definitions of double-breasting and alter ego.[4] Even so, a reliance on such confusion is inappropriate because the General Counsel alleged that the violation is based only on how the contract provision at issue was applied in one instance, i.e., to S & M and SC. The General Counsel admittedly does not contend that the *language* of sec-

[2] Sec. 22 C 1(a) reads as follows:

Section 22: Grievance Procedure and Arbitration. . .

C. Grievances Subject to An Expedited Hearing

1. The following grievances shall be subject to an Expedited hearing:

(a) a complaint filed by the Union alleging a violation of Section 7 (No Strike Or Lockout), Section 26.C (Referral And Hiring Procedure), or a *Contractor illegally using an alter-ego operation to escape the obligations of this collective bargaining Agreement*. [Emphasis added.]

[3] The parties have since agreed to stay this court action pending the outcome of these proceedings.

[4] Particularly informative on this point is the following testimony by Ronald Takeda, the Respondent's community service and education director, and Walter Kupau, its financial secretary and business representative:

[By the Intervenor's counsel]

Question: Mr. Takeda, do you define double breasting as a situation where a union contractor owns an interest in a non-union contractor?

[By Takeda]

Answer: I think that is an instance of double breasting.

Question: And you believe that alter-ego and double breasting are interchangeable?

Answer: Yes.

Question: You've never heard any other definition of alter-ego?

Answer: I think I might have read something somewhere where alter-ego is when somebody goes out of business and starts up somewhere else non-union, but that has never been our understanding or intent when we agreed upon the content language and it is not mine today.

. . . .

[By the Charging Party counsel]

Question: Nature of grievance: The Employer is in violation of the Agreement by its use of SC Pacific Corp. as a double breasted operation. And that was the alleged violation of S & M Sakamoto, is that right?

[By Kupau]

Answer: That's what on the grievance form.

Question: Okay. You weren't accusing them of being an alter-ego of each other, were you, sir?

Answer: What's the difference?

Question: Were you accusing them of being--

Answer: What's the difference?

Question: Answer my question, sir.

Answer: I'm accusing them of alter-ego, double breasting, and anything to do with it. You tell me what's the difference.

Question: I'm asking you at the time you did not accuse them of being an alter ego, did you?

Answer: I don't know if I did or not.

tion 22 C 1(a), in particular the phrase ''illegally using an alter-ego operation,'' violates Section 8(e).

The fact that the General Counsel eschewed any claim that section 22 C 1(a) is unlawful on its face distinguishes this case from the situation presented in *Sheet Metal Workers Local 91 (Schebler Co.)*, 294 NLRB 766 (1989), enfd. 905 F.2d 417 (D.C. Cir. 1990). That case involved whether the respondent union violated Section 8(e) by entering into and maintaining the ''Integrity Clause'' in a collective-bargaining agreement with Winger Contracting Company. The Integrity Clause required that the signatory employer force firms with whom the employer has an ownership interest, either directly or as a parent or subsidiary, to grant to their employees the same contractual wages, benefits, and working conditions. The Board found the violation because the language of the clause itself was not limited to the single-employer definition and, additionally, even if the clause was somehow ambiguous in meaning, which it clearly was not, the respondent union's intent was not limited to affecting the labor relations of firms which come within the single employer definition. Thus, in that case, the respondent union's intent was considered critical to resolve any ambiguity in the meaning of the language set forth in the Integrity Clause. Therefore, because there is no finding that the language of section 22 C 1(a), i.e., ''alter-ego operation,'' is ambiguous, examining either party's intent in agreeing to that contract clause is inappropriate. Given the complaint allegations then, our inquiry is limited to how the Union *applied* section 22 C 1(a).

The Union filed the grievance pursuant to the terms of section 22 C 1(a), seeking to apply this contract provision to what is arguably an alter-ego situation although, as found by the judge, the alter-ego theory ultimately fails. In this regard, as recognized by the judge, there were certain facts that could have favored a finding of alter ego status—the two companies are commonly own by the Sakamoto family; SC was formed to perform residential work, an area previously done by S & M; S & M gave initial financial assistance to SC; equipment sales, rentals, and repairs have occurred between the two companies; two SC executives were formerly associated with S & M; and S & M previously provided certain payroll and administrative support services to SC. However, the judge found these factors were outweighed by the credited testimony regarding SC's independence.

My colleagues argue that the Union never really pursued an alter ego theory for its grievance because Business Representative Kupau thought that common ownership was critical in proving a violation of section 22 C 1(a). This argument fails for two reasons. First, the fact that Kupau may have viewed common ownership as an important ingredient is not inconsistent whatsoever with the Union's alter ego theory. Although common ownership is not the determinative factor in establishing an alter ego relationship, certainly it often precipitates the claim that the two companies may not be separate entities but, in fact, alter egos. Second, it is irrelevant that the union representative may have thought that the scope of section 22 C 1(a) was broader than alter ego because the Respondent's application of that contract provision was not directed to a situation in which an alter-ego relationship was unfathomable. Two examples illustrate this last point. Here, had S & M and SC in fact been alter egos, the Board would not find the pursuit of the grievance to have been unlawful even had the Respondent's representatives been laboring under the same confusion as to the meaning of the term ''alter ego.'' Conversely, if the two companies were not arguably alter egos under a standard of reasonableness, the fact that the Respondent's representatives may have correctly understood the meaning of ''alter ego'' would not have rendered the pursuit of the grievance lawful in those circumstances.

Nor do the Respondent's actions belie an alter-ego theory for its grievance. The July questionnaire submitted to S & M represented an attempt to elicit the very information that is traditionally considered relevant to an alter ego status inquiry. When that attempt was met with resistance, the Respondent filed the September grievance which specifically keyed the dispute with S & M concerning SC to section 22 C 1(a) of the Master Agreement. The Respondent and S & M then handled the grievance by following the expedited procedure to the SJB, reserved for an alter-ego claim, under the terms of the prevailing collective-bargaining agreement.[5]

Moreover, in the circumstances of this case, I do not believe the SJB award should constitute the basis for a violation of Section 8(e). First, alter-ego claims require a fact-specific evaluation and, when the SJB became involved, there had been no prior Board determination as to the kind of relationship which existed between S & M and SC. The SJB was charting new territory and did not have the benefit of the Board's insight.[6] Second, the SJB award is, at best, ambiguous. The majority of the numbered findings comprising its May 29, 1990 clarification for the court could conceivably point to an alter-ego relationship as well as they

[5] On the grievance form, the dispute with S & M was described in terms of double-breasting. I do not consider this less-than-perfect draftsmanship harmful to the Respondent's position because the intended contract violation was clearly spelled out. In addition, in light of its own written arguments presented by its October 12, 1989 letter to the SJB, S & M was indeed aware that the issue to be resolved by the Respondent's grievance was whether alter-ego status existed.

[6] Of course, a dismissal of the 8(e) allegation here does not now permit the Union to seek enforcement of the SJB award given our adoption of the judge's finding that the companies are indeed separate employers.

can be construed as indicators of a non-alter ego, double-breasting operation. Nor is the SJB's eighth finding, i.e., ''[t]he fact that the Master Agreement was intended to prohibit double-breasting as it is understood in the contruction industry'' dispositive since alter egos may also be double-breasted operations.[7] Finally, section 22 C 1(a), never alleged as invalid on its face, is clearly phrased and does not even suggest the unlawful interpretation that the judge would impute to the SJB's ambiguous findings. In fact, the judge found that, during the parties' contract negotiations, the language of section 22 C 1(a) was probably selected to avoid any potential 8(e) problem.[8]

For the above reasons, I would hold that the Respondent did not violate the Act by reasonably trying to determine whether the bargaining and contractual obligations owed by S & M extended to SC's operations. Therefore, I would dismiss the complaint.

[7] See, e.g., *Crawford Door Sales Co.*, 226 NLRB 1144 (1976).

[8] See *Longshoremen ILWU Local 13 (Egg City)*, 295 NLRB 704, 705 (1989) (the Board declined to find a violation of Sec. 8(e) premised on an arbitrator's unlawful interpretation of contract provision at issue).

Wanda Pate Jones, Esq., for the General Counsel.

Dale L. Bennett, Esq., with *Michael F. O'Connor* and *James K. Tam (Moon, O'Connor, Tam & Yuen)*, on the brief, of Honolulu, Hawaii, for the Respondent.

Richard M. Rand, Esq. (Torkildson, Katz, Jossem, Fonseca, Jaffe & Moore), of Honolulu, Hawaii, for the Charging Party.

Mark S. Kawata, Esq., with *Tamotsu Tanaka, Leslie Alan Ueoka*, and *Eric H. Tsugawa (Tanaka & Kawata)*, on the brief, of Honolulu, Hawaii, for S & M Sakamoto, Intervenor.

DECISION

STATEMENT OF THE CASE

WILLIAM L. SCHMIDT, Administrative Law Judge. SC Pacific Corporation (SC or Charging Party) filed an unfair labor practice charge against United Brotherhood of Carpenters and Joiners of America, Local No. 745, AFL–CIO (Respondent or Union) on December 29, 1989.[1]

On April 25, 1990, the Regional Director for Region 20 of the National Labor Relations Board (NLRB or Board) issued a formal complaint. The complaint was amended on May 30 and again on July 19, 1990. The second amended complaint (the operative pleading of the General Counsel called complaint here) alleges that Respondent is engaging in unfair labor practices within the meaning of Section 8(e) of the National Labor Relations Act (Act) by acting to enforce an unlawful interpretation of the current collective-bargaining agreement between the Union and S & M Sakamoto, Inc. (S & M or Intervenor)[2] in order to cause S & M to cease doing business with SC. Respondent timely answered the complaint denying any unlawful conduct.

Pursuant to a notice of hearing, I heard this matter on June 4 and 5, 1991, at Honolulu, Hawaii. Based on the hearing record,[3] the demeanor of the witnesses, and the posthearing briefs received from each party, I find Respondent is engaging in the unfair labor practice alleged based on the following

FINDINGS OF FACT

I. THE ALLEGED UNFAIR LABOR PRACTICE

A. *The Pleadings*

The essence of the complaint is this: SC and S & M, both subsidiaries of S Group, Inc. (S Group), are separate employers under the Act.[4] The Union and S & M are parties to a collective-bargaining agreement (Master Agreement) applicable to employees performing carpentry work in the State of Hawaii. On September 29, 1989, the Union filed a grievance under section 22 C 1(a) of the Master Agreement alleging that S & M was using SC as an alter ego operation to escape S & M's obligations under the Master Agreement. The Union successfully pursued that grievance through the Master Agreement's grievance-arbitration procedure and, thereafter, sought confirmation of its favorable arbitration award in Federal district court. Because SC and S & M are legally separate employers under the Act, the Union's action violated Section 8(e) of the Act.

The gravamen of Respondent's answer is that SC and S & M are alter egos and not separate employers. The Union alleges affirmatively that it pursued the grievance through arbitration and sought confirmation in Federal district court lawfully in order to preserve the work of unit employees under the Master Agreement.

B. *Facts*

1. Historical overview of the relevant enterprises

In 1940, Katsuki Sakamoto and his brother, Minoru, formed a business partnership to engage in business as contractors in the building and construction industry. This partnership, known as K & M Sakamoto (K & M), operated throughout the Territory—and then the State—of Hawaii over the next 2-1/2 decades. In the late fifties or early sixties, K & M entered into a collective-bargaining relationship with the Union.

For most of its existence, K & M constructed various types of structures including industrial, commercial, and gov-

[1] Further dates refer to the 1989 calendar year unless otherwise indicated.

[2] The caption of the case is corrected to reflect S & M Sakamoto, Inc. as a party based on its motion to intervene, granted at the hearing.

[3] The motion to correct the transcript based on the joint stipulation of the parties is granted.

[4] SC's direct inflow exceeds the Board's nonretail discretionary standard for exercising its statutory jurisdiction. The same is true for S & M separately. To the extent that SC may also be deemed a retail enterprise, its gross revenues also exceed the applicable jurisdictional standard. Accordingly, I find that it would effectuate the policies of the Act for the Board to exercise its jurisdiction to resolve this dispute.

ernmental facilities as well as private residences. However, in the early sixties, K & M ceased building private residences and focused entirely on the business and government market.

In 1965, K & M was succeeded by S & M, a closely held family corporation formed by Minoru Sakamoto and his brother, Shuichi. S & M continued K & M's collective-bargaining relationship with the Union. It is bound to the current Master Agreement by virtue of its membership in the General Contractors Labor Association, a local multiemployer group. Over the years, K & M or S & M, or both, acquired valuable real property in Hawaii which was held by the partnership and/or corporation.

By the early to mid-seventies, the next generation of Sakamotos assumed corporate leadership positions. During this period, the sons of Shuichi Sakamoto, Gerard and Norman, and the sons of Minoru Sakamoto, J. Makoto and Francis, became S & M corporate officials.

In 1983, Gerard Sakamoto became president of S & M. His brother Norman was a vice president as were J. Makoto and Francis. This arrangement continued through 1985. By this time, S & M had become one of Hawaii's larger contractors regularly building new commercial, industrial, and government facilities worth at several million dollars yearly.

In 1984 or 1985, Norman expressed a desire to form his own firm to specialize in residential construction and renovation. At the time S & M generally did not operate in either segment of the construction business. More particularly, neither S & M, nor its predecessor K & M, had engaged in the home building and renovation sector of the construction industry in over two decades; however, S & M does seek large commercial, industrial, and government renovation projects.[5]

For whatever reason, Norman chose not to divorce himself entirely from the existing Sakomoto family operation to establish a new company. Instead, outside consultants and a labor law expert were retained to provide advice about establishing a new company—eventually to be headed by Norman—without disrupting S & M's existing labor relations climate.

In the course of this planning, two other objectives were established. These secondary objectives included the establishment of S & M stock options for key S & M employees who were not related to the Sakamoto family and the concurrent removal of S & M's real estate holdings to prevent nonfamily members from acquiring an interest in the real estate.

To achieve all these objectives the consultants recommended—and the Sakamotos adopted—a plan to establish a single holding company with separate operating subsidiaries. Consequently, in February 1985 S Group was formed as a holding company and S & M became an operating subsidiary of S Group.[6] In September 1985, SC was incorporated as a wholly owned, second operating subsidiary of S Group.

Later in approximately 1990, three separate real estate firms were established to hold and manage the Sakomoto family real estate investments. At or about the same time, a new class of S & M voting stock was created and made available to two key S & M employees, Richard Luke and Dennis Ideta. Gerard attributed some of the delay in implementing these secondary objectives to efforts aimed at minimizing potential taxes resulting from the transfer of real property from S & M to the S Group real estate subsidiaries.

2. Post-1985 ownership, control, and operations

Interest in S Group is equally divided between the ancestral lines of Shuichi and Minoru Sakamoto. Thus, Gerard (its vice president-secretary) and Norman (its treasurer) each hold a 25-percent interest in S Group; the remaining 50 percent is divided equally among Minoru Sakamoto and his sons, J. Makoto (its president) and Francis (its vice president). These five individuals comprise S Group's board of directors which meets once a year. S Group has no employees and engages in no day-to-day operations. It has an office at S & M's facility.

SC commenced operations in January 1986. Effective December 31, 1985, Norman resigned as vice president and director of S & M and became SC's president and secretary-treasurer; at that time Norman ceased all employment connection with S & M. Vaughn Miyauchi also resigned his position as an S & M assistant vice president at the end of 1985 and became SC's vice president. Norman, Miyauchi, and Penelope Sakamoto, Norman's wife, comprise SC's board of directors.

After Norman's resignation, S & M's executive committee included: Gerard, president; J Makoto, executive vice president, secretary-treasurer, and marketing director; Francis, vice president of operations; Ideta, vice president-finance; and Luke, vice president for interior construction. These five individuals comprise S & M's board of directors.

S & M is managed by its executive committee. These individuals hire employees, set wages and fringe benefits, approve job bids, secure supplies and materials, and manage projects successfully bid or negotiated.

Apart from this dispute and the related litigation, S & M's collective-bargaining relationships with the Union and other recognized labor organizations has continued amicably. At the time of the hearing, S & M employed about 90 individuals including 50 carpenters (all procured under the hiring hall arrangement in the Master Agreement), 3 operating engineers, 2 laborers, and about 23 office employees. In the years following SC's establishment, S & M's revenues from its traditional operations have steadily increased.

As noted, SC's employees are not represented. At the time of the hearing, it employed about 50 employees including 9 office employees. Its field employees—hired from responses to newspaper advertisements or word-of-mouth applicants—are classed as lead mechanics, mechanics, and helpers rather than along traditional craft lines in the industry. One of SC's field supervisors transferred from S & M when SC began operation; otherwise its project managers and field supervisors were never previously employed at S & M. One SC field mechanic had previously been employed at S & M; one

[5] For example, Gerard reported that one of S & M's more recent projects included one phase of the renovation at the Honolulu Airport.

[6] Presumably, on the formation of S Group, S & M's original stock was exchanged for S Group stock to establish S Group's ownership of S & M. Although this fact is not specifically reflected in the record, S & M's brief alludes to the fact that ''controlling interest'' in S & M is held by S Group. This choice of words apparently takes into account the new class of S & M stock created for key, nonfamily employees.

former S & M office clerk was hired at SC in response to a newspaper advertisement.

Norman hires SC's office employees and sets their wage rates. He also establishes the fringe benefit programs for all employees. The bulk of Norman's time is spent marketing SC's services to architects and owners, and overseeing the project estimating process and other office operations. Miyauchi hires and fixes the wage rates for SC's field employees. Most of his time is spent overseeing SC's field operations.

In February 1986, SC purchased a limited amount of tools, office equipment, and two vehicles from S & M. From time to time, SC has rented certain construction equipment from S & M and has had a limited repairs performed on its equipment in S & M's shop. In addition, when SC first began operating, it rented computer time and payroll services from S & M but that arrangement ceased after SC obtained its own computer and payroll clerks. However, the bulk of SC purchases, rentals, and repairs have been secured from outside vendors unrelated to the Sakamoto family. No effort was made to establish that any of the foregoing exchanges were other than regular arm's-length transactions commonly engaged in by most contractors in the area.[7]

S Group files consolidated tax returns for its subsidiaries. In their most recent fiscal years, S & M's gross revenues exceeded $30 million and SC's gross revenues were about $6 million. Although the evidence does not show the manner in which S Group may have financially supported SC's startup, the evidence shows that S Group did loan SC $100,000 in February 1988 on an unsecured 90-day note and provided SC with an unsecured $150,000 line of credit in August 1988. Both have been repaid and SC now maintains a separate line of credit with the Bank of Hawaii.

Both SC and S & M bank at the same branch of the Bank of Hawaii but have separate accounts. Each company operates with its own state contractor's license, Federal income and state excise tax identification numbers, unemployment insurance account, and worker compensation and temporary disability insurance policies.

SC initially leased office and shop space in a vacant building owned by S & M in the Ewa Beach area on the island of Ohau pursuant to a written lease agreement. Later, SC leased added shop space near its office from an unrelated landlord and has renewed its lease for its original space. S & M's offices and shop are located near the Honolulu International Airport about 20 miles away from SC's offices. Again, no effort was made to establish that SC's space leases are mere paperwork shams.[8]

No evidence was adduced to establish that S & M's executives, engineers, or administrative personnel render any assistance to the SC operation or vice versa. Since resigning their S & M employment at the end of 1985, Norman, Miyauchi, and Supervisor Allan Imamura have had no involvement in the day-to-day operation of S & M. Employees and supervisors of the two operating companies are never interchanged. Although two other former S & M employees now work for SC, nothing suggests that this circumstance was initiated by anyone other than the employees themselves.

SC almost never competes for work sought by S & M and vice versa.[9] The two companies do not consult one another concerning projects of interest or the bids which are submitted to obtain work. SC executives secure their supplies and materials independent of S & M. Gerard and Norman attend family social gatherings a few times each year but, according to Gerard, business is not discussed on these occasions.

3. The grievance against S & M concerning SC

In June 1989, Walter Kupau, the Union's financial secretary, and Gerard spoke by telephone on two occasions concerning SC. In essence, Kupau asked that SC become a union signatory and Gerard, after speaking with Norman, advised Kupau that Norman declined to do so.

The Union next sent Gerard extensive questionnaires in late July 1989 seeking information concerning S & M's relationship and involvement in the affairs of SC and S Group. Gerard completed the questionnaires with Ideta's assistance and returned them to the Union. No SC executive was consulted in the preparation of the questionnaires; consequently, interrogatories concerning SC's operation went largely unanswered.

On September 29, the Union filed a grievance under section 22 C 1(a) of the Master Agreement against S & M.[10] Specifically, the grievance charges that S & M ''is in violation of the Agreement by its use of SC Pacific Corp. as a double-breasted operation.'' The Union's grievance sought a cessation of the alleged contract violation and a make whole remedy for the ''union/employees.''

In accord with 22 C procedure, the grievance was referred to a contractual, bilateral grievance resolution committee known as the State Joint Board (SJB) for an expedited hearing.[11] The hearing was held on October 12. The Union's presentation was made by Ron Taketa, the Union's community service and education director, who relied largely on the questionnaires. Gerard appeared and responded to Taketa's questions. And in response to a question from Kupau, Gerard acknowledged that SC was a double-breasted operation but asserted that it was a legal double-breasted operation. Following Gerard's appearance, S & M's attorney, Mark S. Kawata, presented the SJB with a lengthy legal memorandum

[7] This is so notwithstanding the fact that the Union has had access to the discovery process under the Federal Rules of Civil Procedure in the ancillary case pending in Federal district court on the grievance decisions.

[8] SC's current lease for its office space is with SM Associates (SMA), one of the real estate subsidiaries of S Group. However, SMA was also described as limited partnership in which S & M holds as 50-percent interest. Gerard indicated that S & M plans to eventually divest itself completely of its interest in SMA.

[9] Although he denied any awareness of the circumstance when it occurred, Gerard admitted that SC and S & M had been competing bidders on one recent renovation project. The two companies appear to have never bid against each other for any other project.

[10] Among other matters sec. 22 C 1(a) provides for an expedited hearing on a ''complaint filed by the Union alleging . . . a Contractor illegally using an alter-ego operation to escape the obligations of this collective bargaining Agreement.'' All agree that the Union's grievance relates to this specific provision. The Union believes this language prohibits double-breasting altogether.

[11] During that particular term of the SJB, Kupau served as the SJB chairman; one of the signatory contractors' executives served as the SJB secretary. These positions rotate between the Union and the contractors each term. The SJB voting members always consist of an equal number of union-designated members and contractor-designated members.

arguing that S & M and SC were separate employers and not alter egos.

At the conclusion of the hearing, the SJB deliberated and later that afternoon announced that the Union's grievance had been upheld. The following day the SJB sent written confirmation of its decision to Gerard. The SJB letter directs S & M to ''cease the contract violation and make the union/employees whole for any loss sustained therefrom.''

In the meantime, S & M commenced an action in Federal district court on the day before the SJB hearing in an effort to stay the proceedings. Over the next 5 months the parties engaged in a series of maneuvers in this proceeding until March 27, 1990, when Respondent filed a motion for confirmation of the arbitration award and entry of judgment. On April 11, Judge Alan C. Kay remanded the proceeding to the SJB to clarify its award and to make specific findings concerning the contract violations.

On May 29, 1990, the SJB reconvened and considered the remand. The minutes reflect the following:

> CONTRACT VIOLATION:
>
> Chairman Kupau read the following State Joint Board's decision which was based on the following evidence:
>
> (1) Gerard Sakamoto, President of S & M Sakamoto, admitted that his company and SC were double-breasted;
>
> (2) All of the principal representatives of S & M Sakamoto, Inc. are members of the Board of Directors for the S Group, which is the holding company of S & M Sakamoto, Inc. and SC Pacific Corp.;
>
> (3) Gerard Sakamoto admitted that profits from S & M Sakamoto and SC Pacific Corp., go to the S Group;
>
> (4) The directors of all three companies are the same people;
>
> (5) Gerard Sakamoto, as a Director, derives income from profits received from S & M Sakamoto and SC Pacific Corp.;
>
> (6) The same firms are used by S & M Sakamoto and SC Pacific Corp. for Workers' Compensation insurance, banking and payroll;
>
> (7) The office of SC Pacific Corp. was previously owned by S & M Sakamoto, and;
>
> (8) The fact that the Master Agreement was intended to prohibit double-breasting as it is understood in the construction industry.

Based on these facts, the SJB unanimously decided that S & M violated section 22 C 1(a) ''by its use of SC Pacific Corp., as a double-breasted operation.'' The supplemental decision requires S & M to: (1) cease the contract violation; (2) pay SC's carpenters the difference between their actual wage rate and the contract scale; (3) make the contractual trust funds whole on behalf of SC's carpenters; (4) submit to the SJB a verified payroll audit as provided in section 23 F of the Agreement; and, (5) ''immediately cease the double-breasting operation.''

Pending the outcome of this litigation, the parties have agreed to stay the Federal district court proceeding.

C. *Further Findings and Conclusions*

Double-breasting in the building construction industry, at the core of this dispute, is a practice which construction trade unionists regard as a pustule on the collective-bargaining process.[12] Their call for legislative surgery to remove it implicitly acknowledges that double-breasting is lawful in certain circumstances. *BNA News and Background Information*, 134 LRR 378, 379, July 23, 1990.

Here, the Union believes S & M has engaged in a form of double-breasting prohibited by the Master Agreement. The General Counsel, Charging Party, and Intervenor claim that the Union's successful pursuit of its 22 C 1(a) grievance and its motion to confirm the SJB award in the Federal district court serve to convert that contractual provision into a de facto hot cargo agreement prohibited by Section 8(e) of the Act.[13]

The General Counsel's case is grounded on the claim that S & M and SC are legally separate employers and the outcome of the Union's grievance here will either force SC to adhere to all terms of the Master Agreement or force S & M to effectively cease doing business with SC.

The Union believes that its successful 22 C 1(a) grievance against S & M and its subsequent Federal district court enforcement action are efforts directed at a primary, rather than a secondary, objective and, therefore, it is outside the ''cease doing business'' proscription of Section 8(e).

Hence, the Union's brief asserts that the ''focus [of section 22 C 1(a) and the Union's enforcement action] is the concern . . . [the Union] had with the growing tide [of] non-union contractors created by employers who also had a union operation.'' Fairly read, the Union is claiming that its 22 C 1(a) grievance seeking the elimination of the admitted double-breasting present here falls within the work preservation exception recognized under Section 8(e).

From the Union's viewpoint, the strict application of the Board's single employer doctrine in these cases perverts Sec-

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[12] The Board described the essence and legal ramifications of double-breasting as follows in *Walter N. Yoder & Sons*, 270 NLRB 652 fn. 6 (1984):

> A ''double-breasted'' operation is one in which a contractor operates two companies, one unionized and the other nonunionized. Depending on how the companies are structured and operated, each may be a separate corporation or else both may be so interrelated that they constitute a single employer or one may be the alter ego of the other. A collective-bargaining contract signed by one of the companies would not bind the other if each were a separate corporation, but would bind the other if both constituted a single employer and the employees of both companies constitute a single appropriate bargaining unit or the nonsignatory company is an alter ego of the signatory company. *Associated General Contractors of California*, 242 NLRB 891, 892 fn. 5 (1979), enfd. as modified 633 F.2d 766 (9th Cir. 1980), cert. denied 452 U.S. 915 (1981); *Burgess Construction*, 227 NLRB 765, 770–771, 773–774 (1977), enfd. 596 F.2d 378 (9th Cir. 1979), cert. denied 440 U.S. 940 (1979); *George C. Shearer Exhibitors Delivery Service*, 262 NLRB 622, 623–624 (1982), enfd. mem. 714 F.2d 124 (3d Cir. 1983).

[13] The General Counsel eschews any claim that sec. 22 C 1(a) is unlawful on its face. The position of the Charging Party and Intervenor on this point is less clear. To the extent that they make that claim, I have disregarded it both as lacking merit and as an impermissible effort to effectively amend the General Counsel's complaint.

tion 8(e)'s intent, encourages double-breasting, and erodes work opportunities for unit employees. But aside from these other claims, the Union also argues that SC is legally S & M's alter ego.

Section 8(e) provides in relevant part that:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided*, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work. . . .

This 1959 amendment to the Act sought to close one of the loopholes in the secondary boycott provisions originally enacted in 1948. The principal evil congressional proponents of this provision sought to outlaw was the so-called hot cargo agreement in the transportation industry. Such agreements typically required the contracting employer to refrain from handling the goods of any other employer with whom the Teamsters Union had a labor dispute. However, Section 8(e) bans ''not just explicit 'hot cargo' clauses, but all clauses sanctioning in advance a secondary boycott'' other than as specified in the proviso—not applicable here—with respect to onsite construction.[14] *Orange Belt District Council of Painters v. NLRB*, 328 F.2d 534, 537 fn. 6 (D.C. Cir. 1964).

Section 8(e)'s limited application only to secondary activity is clear. *National Woodwork Mfrs. Assn. v. NLRB*, 386 U.S. 612 (1967). There the Supreme Court observed that ''[a]lthough the language of § 8(e) is sweeping, it . . . [does] not reach employees' activity to pressure their employer to preserve for themselves work traditionally done by them, [and] § 8(e) does not prohibit agreements made and maintained for that purpose.'' Id. at 635. Instead, the Court said that ''[t]he touchstone [of Section 8(e)] is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer vis-a-vis his own employees'' as opposed to being ''tactically calculated to satisfy union objectives elsewhere.'' Id. at 645, 646.

And in *Operating Engineers Local 12 (Griffith Co.)*, 212 NLRB 343 (1974), enf. denied 545 F.2d 1194 (9th Cir. 1976), cert. denied 434 U.S. 854 (1977), the Board explained that:

> [E]very bargaining contract with a cease doing business objective, although literally within the proscription of Section 8(e) of the Act, is not necessarily unlawful. The Board and the courts have held that a union may lawfully require a contracting employer to cease or refrain from doing business with another employer if the union's objective properly falls within certain carefully delineated exceptions, such as ''work preservation'' and maintenance of ''union standards.'' [Footnotes omitted.]

Section 8(e)'s ''enter into'' requirement reaches both the initial agreement and any subsequent bilateral affirmation or interpretation which may be deemed unlawful. *Elevator Constructors (Long Elevator)*, 289 NLRB 1095 (1988); *Bricklayers Local 2 (Gunnar I. Johnson & Son)*, 224 NLRB 1021, 1024–1025 (1976), enfd. 562 F.2d 775 (D.C. Cir. 1977). Thus, the Union's 22 C 1(a) grievance against S & M and its subsequent effort to enforce the favorable SJB awards—all occurring within the 10(b) period—satisfy the ''enter into'' requirement.

Likewise, the ''cease doing business'' requirement of Section 8(e) includes ''any pressure calculated to cause a significant change or disruption of a neutral employer's mode of business.'' *Sheet Metal Workers Local 91 v. NLRB*, 905 F.2d 417, 421 (D.C. Cir. 1990). Union efforts aimed at compelling SC to apply the Master Agreement to its employees performing carpentry work meets that requirement if such efforts are not otherwise privileged.

On its face, the Union's work preservation claim has considerable appeal. Thus, its bargaining unit is comprised of all employees performing work under the Master Agreement in Hawaii who are employed by employers bound to the agreement. A cursory review of the Master Agreement discloses that it applies not only to journeymen carpenters but also to more specific employee categories including hardwood floor layers, pneumatic nailers, and wood shinglers. Those are skills extensively employed in homebuilding and renovation work such as that performed by SC.

In addition, the Master Agreement provides for the maintenance of separate referral lists for finish, form, and framing carpenters, hardwood floor layers, pneumatic nailers, and wood shinglers on an island-by-island basis. These hiring hall provisions, a core element in most construction trade collective-bargaining agreements, further reinforce the Union's legitimate interest in work opportunities for its members and nonmember hiring hall applicants. Here too, the skills reflected obviously parallel those which SC requires in its business pursuits.

The antipiece work, contracting, and moonlighting work rules in the Master Agreement also seek to limit the performance of work covered by the agreement to the confines of the contracting employer-employee relationship. In particular, the antimoonlighting rules provide that ''[n]o contractor shall allow any moonlighting of work to be done for him'' and defines moonlighting as ''an employee performing work covered by this Agreement for someone other than the Contractor by whom he is employed at less than the wage and benefit rates as provided for in this Agreement.'' Under this contract, moonlighting appears to include more than afterhours work.

Recognizing that unit employees who work on S & M projects from time to time are well qualified to perform SC's regular work obviously leads the Union to question why the owners of an enterprise bound to its Master Agreement should be entitled shield themselves against the clear terms of the agreement by means of corporate structuring devices.

[14] The Union does not claim that the onsite proviso of Sec. 8(e) applies here. And it plainly does not. As shown below, S & M and SC do not consciously compete in the same market.

Nevertheless, it is entirely possible to do just that. Clearly, if S & M had merely branched out into the work now performed by SC, the Union's claim that the agreement applied to that carpentry work would be unquestionable. But on the other hand, if S & M and SC were completely unrelated entities the Union's claim would obviously be untenable. The situation here falls between those two extremes.

The element of common ownership, such as is found between S & M and SC, invariably ignites these controversies. However, for decades the national labor law simply has not accorded conclusive weight to this element in deciding single-employer questions. See, e.g., *Miami Newspaper Printing Pressmen Local 46 (Knight News Papers)*, 138 NLRB 1346 (1962).

The legal norm is that separate business entities of all forms are deemed to be separate employers. However, where nominally separate entities are shown to be integrated to such a degree that they no longer exhibit the qualities characteristic of the arm's-length relationship found among unintegrated companies, the separate business form is disregarded and those entities are treated as one either under the theory that one is the alter ego of the other or that, together, they constitute a single employer. See, e.g., *Crawford Door Sales Co*., 226 NLRB 1144 (1976); *Overton Markets*, 142 NLRB 615 (1963).

Although the impact of an alter-ego finding can differ considerably from a single-employer finding, these two legal theories examine many similar elements. Thus, factors relevant in alter ego cases include the degree of common ownership, management, supervision, operation, equipment, and customers among related entities, as well as the presence or absence of an unlawful motive to evade responsibilities under the Act. *Asbestos Carting Corp*., 302 NLRB 197 (1991); *Advance Electric*, 268 NLRB 1001 (1984).[15]

Single-employer questions are resolved by examining whether the entities have common ownership, common financial control, interrelated operations, and centralized control of labor relations. *Radio Union Local 1264 v. Broadcast Service*, 380 U.S. 255 (1965).

No one factor controls under either theory and all factors need not be present before the separate business form can be disregarded. *Operating Engineers Local 627 v. NLRB*, 518 F.2d 1040, 1045 (D.C. Cir. 1975), affd. in pertinent part 425 U.S. 800 (1976).

As noted, the real divergence between the alter-ego and single-employer concepts is seen in their potential impact. For example, in the circumstances found here, an alter ego finding, ipso facto, subjects SC to the terms of the Master Agreement. *Advance Electric*, supra at 1004.

By contrast, a single-employer finding would mean only that employees performing carpentry work for the nominally separate employers are actually employed by the same employer. In this case, the added question as to whether two groups of employees also comprise a single bargaining unit—and potentially subject to the same collective-bargaining agreement—rests on the further consideration of traditional community-of-interest factors.[16] *South Prairie Construction Co. v. Operating Engineers Local 627*, 425 U.S. 800 (1976).

I have concluded that SC and S & M are separate employers and that SC is not S & M's alter ego. The Union's alter-ego argument is particularly unsupportable. The facts here do not reflect the characteristic ''technical change in the structure or identity of the employing identity, frequently to avoid the effect of the labor laws, without any substantial change in . . . ownership and management.'' *Howard Johnson v. Detroit Local Joint Executive Board*, 417 U.S. 249, 259 fn. 5 (1974).

Instead, SC was carefully created and is operated for the purpose of engaging in a segment of the construction business S & M avoided for two decades, largely continues to avoid to this day and plans to avoid in the future. SC's creation and operation resulted in no real impact on S & M's continued existence or operation, a circumstance almost always present in alter ego cases. Even assuming, as I have, that the Sakamoto family business managers consciously predetermined SC nonunion status before it was formed and commenced operation, that fact would not merit the conclusion that they were seeking to evade their obligations under the Act with respect to S & M's traditional operation.

Concededly, these two operating companies are commonly owned by the Sakamoto family for all practical purposes.[17] And clearly, both S & M and S Group, provided some direct and indirect financial seeding for SC in the form of costly, expert technical advice concerning the formation of SC and, later, a loan and credit line, since repaid, to support SC operations. And as noted, for purposes of this decision I have assumed that the Sakamoto family business managers did make a fundamental decision at the outset that SC would be a nonunion operation.[18]

Yet, practically no evidence supports a finding that the two companies are operationally integrated, financially dependent on each other, or commonly managed. From all appearances, S Group does not interfere even in fundamental policy making related to its subsidiaries' operations. Following their departure from S & M at the end of 1985, neither Norman nor Miyauchi have had the slightest involvement in S & M's operations;[19] similarly, after SC was ''up and run-

[15] The Ninth Circuit, where this case arises, perceives the evasion of the Act motive as critical in alter ego cases. Thus, in *A. Dariano & Sons v. District Council of Painters No. 33*, 869 F.2d 514, 519 (9th Cir. 1989), that court asserted that ''[i]n all alter ego determinations an element of fraud or misrepresentation also exists'' and that ''it is proper to conclude that in all alter ego determinations there must first be a threshold finding of single employer of some kind.''

[16] Here, of course, sec. 22 C 1(a), not surprisingly, specifically relates to unlawful alter ego situations. Notwithstanding Union Agent Kupau's repeated assertions, spiced with a good deal of bluster, that this language really prohibits double-breasting in all forms, I strongly suspect that someone at the bargaining table where this language was produced, or their advisors, recognized that the terms are not conterminous and carefully selected the 22 C 1(a) language precisely to avoid claims, like here, of unlawful secondary activity.

[17] But for the separate class of stock later created at S & M to permit ownership involvement by that company's nonfamily, key employees, the ownership of the two companies would be completely identical.

[18] Gerard acknowledged that he had studied the double-breasting literature in trade journals and that the professional advice sought was designed to establish lawful double-breasting operations. Absent the fundamental decision about SC's nonunion status, the caution seen here involving the creation of SC would most likely not be present.

[19] And Penelope, the other SC director, has never been involved in S & M operations even as an employee.

ning'' no S & M executive has been involved with SC's affairs.

Furthermore, the markets which the two companies are designed to exploit only marginally overlap. Gerard's acknowledgement that the two had competed against each other only for a single renovation project in more than 5 years lends considerable credence to the separate employer claim and substantially undercuts the argument that SC was designed to—or indeed does—undermine S & M's traditional business operation.[20] The two Sakamoto firms were never designed to compete with one another and they have not done so; rather they are designed to function in radically different segments of the construction industry. Office and industrial building contractors are rarely found competing to build custom, middle-class homes; custom home builders are rarely found building high rises.

Although I am entirely skeptical of claims that Norman alone is vested with authority to alter the fundamental decision concerning SC's nonunion status, all remaining labor relations policies of the two companies are not centrally controlled; during their concurrent existence, the labor policies at both companies have been separately determined and managed by their own executives. S & M's unit employees are compensated under the union contract; its executive committee fixes the wages and benefits of nonunit employees. S & M has taken no steps to evade its historic bargaining obligations with the Union and fully anticipates a continued relationship.

No personnel integration of any kind exists between the two Sakamoto operating companies. S & M's executives have nothing to do with the wages or benefits at SC. To the contrary, the evidence shows these matters are in the exclusive domain of Norman and Miyauchi. Each maintains separate work forces which are separately supervised. Neither employees nor supervisors are utilized commonly or interchanged. No evidence shows that either operating company looks to the other as a source for its nonunit personnel. The fact that two former S & M employees now work at SC is without significance where they initiated the move.

The executives of each operating company appear to be vested with full authority to manage their respective companies.[21] No evidence shows that the executives regularly visit other company's premises or confer on job bids or potential business. The financial affairs of each company appears to be the responsibility of their respective executives. Although SC initially had contracts with S & M for certain payroll and computerized administrative support services that have now been discontinued, no effort was made to show that these transactions were a sham or otherwise not at arm's length, properly purchased and paid for at reasonable market rates.

Similarly, the initial sale of equipment as well as the subsequent equipment rentals and repairs between S & M and SC also appear to have been limited and somewhat routine in the business. The fact that S & M from time to time engages in similar business transactions with other unrelated enterprises substantially diminishes the significance this evidence might otherwise have.

Moreover, the office locations of the two operating companies are entirely separate and no showing was made that managers or employees had any regular contact with each other. The fact that SC leases a portion of its office and shop space from other Sakamoto family firms lacks significance in the absence of evidence indicating that the leases were not genuine or that the rental amounts were not reasonable market prices for similar accommodations.

Each company maintains separate bank accounts (albeit at the same branch bank), insurance policies, and business licenses. Each company procures its own supplies and materials independent of the other. Each company utilizes a separate group of specialized subcontractors for the performance of their separate work.

In sum, the establishment of SC has caused no change in S & M's business purpose, scope or method of operation, or labor relations policies. The establishment of SC did not result in the loss of existing employment opportunities at S & M; indeed, S & M appears to have expanded within its traditional area of operation as measured by its increasing gross revenues since the creation of SC.

Concluding as I have that SC and S & M are separate employers notwithstanding their common ownership, I find that the Union's work preservation argument lacks merit. Instead, the Union's grievance in this case is a work acquisition device; the Union's pursuit of its 22 C 1(a) grievance against S & M at all stages did not address the labor relations of S & M but rather sought to satisfy the Union's objectives elsewhere, namely, at SC. Therefore, I find that the Union violated Section 8(e) as alleged.

II. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of the Respondent set forth above, occurring in connection with the Charging Party's business operations, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

CONCLUSIONS OF LAW

1. SC and S & M are separate employers engaged in commerce within the meaning of Section 2(2), (6), and (7) and Section 8(e) of the Act.

2. The Respondent is a labor organization within the meaning of Section 2(5) of the Act.

3. By filing its September 29, 1989 grievance under section 22 C 1(a) of the Master Agreement against S & M, prosecuting the grievance before the State Joint Board, and thereafter seeking to confirm the State Joint Board's awards on the grievance in Federal district court, Respondent violated Section 8(e) of the Act as alleged.

4. Respondent's unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

The recommended Order requires Respondent to cease and desist from the unfair labor practice found and to take the

[20] I credit Gerard's claim that he did not become aware of this competition until long after it had occurred. In general, I found both Gerard and Norman to be very credible witnesses based on their serious demeanor, candor, and responsiveness while testifying.

[21] Based on this record, the SJB finding that ''the directors of [S Group, S & M, and SC] are the same people'' is erroneous.

following affirmative action designed to effectuate the policies of the Act.

The recommended Order requires Respondent to notify the State Joint Board in writing that it has withdrawn its September 29, 1989 grievance against S & M and to request the State Joint Board to vacate its awards on that grievance. As the object of Respondent's grievance is unlawful, Respondent is further required to dismiss its action in Federal district court seeking confirmation of the State Joint Board awards on its grievance against S & M. See *Elevator Constructors (Long Elevator)*, supra.

Finally, Respondent must post the attached notice to inform employees and members of the outcome of this matter.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[22]

ORDER

The Respondent, United Brotherhood of Carpenters and Joiners of America, Local No. 745, AFL–CIO, its officers, agents, and representatives, shall

1. Cease and desist from pursuing in any manner its September 29, 1989 grievance against S & M Sakamoto, Inc. which alleges that firm violated the Master Agreement covering carpenters in the State of Hawaii to which Respondent is bound by engaging in the practice of double-breasting with SC Pacific, Corp., or entering into any other agreement, express or implied, whereby an employer agrees to cease and refrain from handling, using, selling, transporting, or otherwise dealing in any of the products of any other employer, or from doing business with any other person in violation of Section 8(e) of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Notify in writing the State Joint Board established under the aforesaid Master Agreement that it withdraws its September 29, 1989 grievance against S & M Sakamoto, Inc. and request the State Joint Board to vacate its awards related to that grievance.

(b) Dismiss its action before the United States District Court for the District of Hawaii in Civil Case 89–00792 ACK seeking confirmation of the awards of the State Joint Board concerning its September 29, 1989 grievance against S & M Sakamoto, Inc.

(c) Post at its offices and meeting halls in the State of Hawaii copies of the attached notice marked ''Appendix.''[23] Copies of the notice, on forms provided by the Officer-in-Charge for NLRB Subregion 37, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Sign and return to the Officer-in-Charge of Subregion 37 sufficient copies of the notice for posting by SC Pacific, Corp. and S & M Sakamoto, Inc., if willing, at all places where notices to employees are customarily posted.

(e) Notify the Officer-in-Charge of Subregion 37 within 20 days from the date of this Order what steps have been taken to comply.

[22] All outstanding motions inconsistent with this decision are overruled. If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[23] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT pursue in any manner our September 29, 1989 grievance against S & M Sakamoto, Inc. which alleges that firm violated the Master Agreement by engaging in the practice of double-breasting with SC Pacific, Corp., or enter into any other agreement, express or implied, whereby an employer agrees to cease and refrain from handling, using, selling, transporting, or otherwise dealing in any of the products of any other employer, or from doing business with any other person in violation of Section 8(e) of the National Labor Relations Act.

WE WILL notify, in writing, the State Joint Board established under our Master Agreement that we withdraw our September 29, 1989 grievance against S & M Sakamoto, Inc., and request the State Joint Board to vacate its awards related to that grievance.

WE WILL dismiss our action before the United States District Court for the District of Hawaii in the Civil Case 89–00792 ACK seeking confirmation of the awards of the State Joint Board concerning our September 29, 1989 grievance against S & M Sakamoto, Inc.

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL NO. 745, AFL–CIO